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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA • SAN DIEGO

12 DAVID SANTOYO,

13 Plaintiff,

14 vs.

15 MANUEL SOTO, JR., JAMES
16 SILBERMAN, JUAN RAMON SALAZAR,
17 AND DOES 1 TO 10,

18 Defendants.

Case No. 08-CV-1000 W BLM

Assigned to Hon. Thomas J. Whelan
Courtroom 7

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT MANUEL SOTO'S
MOTION TO DISMISS**

[Fed. R. Civ. P. 12(b)(1)]

**NO ORAL ARGUMENT PURUSANT
TO LOCAL RULE**

Date: August 25, 2008

Filed concurrently with:

- Memorandum of Points and Authorities;
- Request for Judicial Notice;
- Declaration of Arthur A. Severance; and
- Declaration of Manuel Soto, Jr.

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1 **I. INTRODUCTION**

2 Defendant MANUEL SOTO, JR. ("Defendant") moves the Court to dismiss the
3 Complaint filed by Plaintiff DAVID SANTOYO ("Plaintiff") pursuant to Rule 12(b)(1) of the
4 Federal Rules of Civil Procedure because the Court lacks subject matter jurisdiction to hear
5 Plaintiff's claims.

6 Although Plaintiff has attempted to invoke the Court's admiralty jurisdiction by
7 alleging that the waters of the Senator Wash Reservoir are navigable, they are in fact not
8 navigable for purpose of establishing admiralty tort jurisdiction. Consequently, Plaintiff's
9 claims are not cognizable in admiralty.

10 As the Court lacks another jurisdictional basis, it cannot hear Plaintiff's Complaint.

11 **II. FACTUAL BACKGROUND**

12 Plaintiff's Complaint alleges that the Court has admiralty tort jurisdiction under 46
13 U.S.C. § 740 et seq. and 28 U.S.C. § 1333(1). (Compl. ¶ 1.) Plaintiff does not invoke any
14 other jurisdictional basis, nor does he allege an amount in controversy in this action. (See
15 Compl. ¶¶ 1-4.) The Complaint alleges that Plaintiff, Defendant, and the other named
16 defendants in this action are all residents of the State of California. (Compl. ¶¶ 2-3.)

17 Plaintiff's two causes of action against Defendant allege that he negligently caused
18 Plaintiff's injuries "while on the navigable waters of Senator's [sic] Wash" on June 10,
19 2006. (Compl. ¶¶ 8-9, 22.)

20 Senator Wash Reservoir is a small land-locked body of water that is wholly contained
21 in Imperial County in the State of California. (Def.'s Req. J. Notice; Soto Decl. ¶¶ 8-10, Ex.
22 A at 3, Ex. B, Ex. C at 15; Severance Decl. Ex. A at 3, Ex. B at coordinates E2 to F2, Ex. C at
23 15, Ex. D at 6, Ex. E; Cano v. Neill, 473 P.2d 487, 489 (Ariz. Ct. App. 1970).) It is an "off-
24 stream storage facility" for excess water from the Colorado River system, which is
25 mechanically pumped into and out of the reservoir. (Def.'s Req. J. Notice; Severance Decl.
26 Ex. D at 6, Ex. E, Ex. F at 24.) Senator Wash Reservoir is also used for recreational purposes
27 such as boating and swimming. (See Def.'s Req. J. Notice; Compl. §§; Severance Decl. Ex.
28 E, Cano, 473 P.2d at 489.)

1 It is not physically possible to operate a vessel to travel from Senator Wash Reservoir
 2 onto any other body of water. (Soto Decl. ¶ 12; see Def.'s Req. J. Notice; Soto Decl. Ex. A at
 3 3, Ex. B, Ex. C at 15; Severance Decl. Ex. A at 3, Ex. B at coordinates E2 to F2, Ex. C at 15.)
 4 Lockless earthen dams and dikes prevent vessels on the waters of Senator Wash Reservoir
 5 from traveling onto the waters of the Colorado River system. (Soto Decl. ¶¶ 8, 11; see Soto
 6 Decl. Ex. A at 3, Ex. B, Ex. C at 15; Severance Decl. Ex. A at 3; Ex. B at coordinates E2 to
 7 F2, Ex. C at 15, Ex. D at 5-6 (no description of navigable locks), Ex. F at 24 (no description
 8 of navigable locks).)

9 **III. ARGUMENT**

10 **A. For the Court to Exercise Admiralty Jurisdiction Here, It Must Find That** 11 **Senator Wash Reservoir Is a Navigable Waterway.**

12 “Federal courts are courts of limited jurisdiction, and must be able to identify a source
 13 of such jurisdiction in order to proceed with an individual case.” In re Everglades Island Boat
 14 Tours, LLC, 484 F.Supp. 2d 1259, 1261 (M.D. Fla. 2007). Plaintiff alleges that the Court has
 15 admiralty jurisdiction over his claims under 46 U.S.C. § 740 and 28 U.S.C. § 1333(1).
 16 (Compl. ¶ 1).

17 This Court’s admiralty jurisdiction is established by Article III, Section 2 of the U.S.
 18 Constitution and 28 U.S.C. § 1333(1). E.g., Gruver v. Lesman Fisheries, Inc., 489 F.3d 978
 19 (9th Cir. 2007). The purpose of admiralty jurisdiction is to “protect and promote maritime
 20 commerce by the application of uniform rules on navigable waterways.” In re Three Buoys
 21 Houseboat Vacations U.S.A., Ltd., 921 F.2d 775, 780 (8th Cir. 1990); Oseredzuk v. Warner
 22 Co., 354 F.Supp. 453, 455 (D.Penn. 1972).]

23 The exercise of admiralty jurisdiction is not appropriate in cases that “involve[]
 24 considerations of an exclusively local nature, devoid of substantive federal interest.”
 25 Oseredzuk, 354 F.Supp. at 455. To determine whether the facts of a case implicate the
 26 purpose of admiralty jurisdiction to promote uniform rules regarding maritime commerce, or
 27 whether they instead indicate that the case is solely of local concern, federal courts have
 28 developed a two-part test for admiralty jurisdiction.

To properly invoke federal admiralty jurisdiction over tort claims such as the negligence alleged in Plaintiff's Complaint, "at the outset of the case," Plaintiff must "establish both that the wrong occurred on the navigable waters of the United States (the "locality test") and that the activity giving rise to the incident had a substantial relationship to traditional maritime activity (the "nexus test")" In re Bernstein, 81 F.Supp.2d 176, 177-78 (D.Mass. 1999); Gruver, 489 F.3d at 982; H2O Houseboat Vacations Inc. v. Hernandez, 103 F.3d 914, 915, 916 (9th Cir. 1996); Three Buoys, 921 F.2d 775, 777 (8th Cir. 1990), citing Sisson v. Ruby, 497 U.S. 358 (1990); Crawford v. Electric Boat Corp., 515 F.Supp. 2d 282, 288 (D.Conn. 2007); Hardwick v. Pro-Line Boats, Inc., 895 F.Supp. 145, 146 (S.D. Tex. 1995); see Minix v. Fellers, 654 F.Supp. 1127, 1128 (N.D. Cal. 1987).

The U.S. Court of Appeals for the Ninth Circuit refers to these tests as the "location" and "connection" tests.¹ Gruver, 489 F.3d at 982; see also Three Buoys, 921 F.2d at 777 (referring to them as the "situs" and "status" tests).

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¹ Although this Memorandum of Points and Authorities focuses on challenging the jurisdictional allegation regarding the location test, that Senator Wash Reservoir is a navigable waterway, Defendant does not concede that the connection test is met here.

Defendant does concede that an accident involving recreational vessels or crafts on a navigable waterway has the potential to impact maritime commerce, Hardwick, 895 F.Supp. at 148, which is one of the two subparts of the connection test. Gruver, 489 F.3d at 982.

The potential impact on maritime commerce stems from the fact that the accident occurs on navigable waters, which, as discussed in Section III.C. below, are navigable because they have the potential to carry interstate commerce. Where, as here, the waters are not navigable, they do not have the potential to carry interstate commerce, so any accident upon them is incapable of impacting maritime commerce. Accordingly, the connection test for admiralty tort jurisdiction fails.

A thorough inquiry into the connection test is pointless here. As demonstrated in Section III.C. below, the existence of a navigable waterway under the location test is a threshold issue. Since there is no evidence to support a finding that Senator Wash Reservoir is navigable for the purposes of determining admiralty jurisdiction, the Court cannot reach the connection test.

B. The Court May Consider External Evidence in Determining Whether Senator Wash Reservoir Is a Navigable Waterway.

Proper invocation of admiralty tort jurisdiction not only requires affirmative allegations regarding navigable waters and a substantial relationship to traditional maritime activity, the allegation of these jurisdictional elements must also be non-frivolous. Bernstein, 81 F.Supp. at 177, quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 527 (1995).

The Court may hear a factual challenge under Rule 12(b)(1) so long as the jurisdictional allegations “do[] not implicate the merits of plaintiff’s cause of action.” Morrison v. Amway Corp., 323 F.3d 920, 926 (11th Cir. 2003) (emphasis omitted). The judicial allegation does not implicate the merits of Plaintiff’s cause of action if it “appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous.” Safe Air for Everyone v. Miller, 373 F.3d 1035, 1039 (9th Cir. 2003).

Plaintiff’s Complaint alleges two causes of action for negligence against Defendant. The elements of negligence in maritime law are essentially the same as in common law: duty, breach, causation, and damages. Lloyd’s Leasing Ltd. v. Conoco, 868 F.2d 1447, 1449 (5th Cir. 1989). The existence of a navigable waterway and a substantial relationship to traditional maritime activity are not a required elements of Plaintiff’s negligence claims, and are therefore immaterial to them.

The only reason that Plaintiff alleges Senator Wash Reservoir is a navigable waterway is to obtain federal jurisdiction. Absent admiralty tort jurisdiction, Plaintiff must bring this action in state court in California where the doctrine of primary assumption of the risk is fatal to his claims. In Record v. Reason, 86 Cal. Rptr. 2d 547, 554, 556 (1999), the court held “that tubing is a sporting activity subject to primary assumption of the risk” and that the driver of a boat pulling a tube was a protected coparticipant in the activity. See also Bjork v. Mason, 92 Cal. Rptr. 2d 49, 53-54 (2000) (adopting the reasoning of the Record court in another tubing case).

1 Plaintiff seeks to circumvent operation of the doctrine by bringing his claims in federal
 2 court in admiralty law, where the doctrine is not available. DuBose v. Matson Nav. Co., 403
 3 F.2d 875, 877 (9th Cir. 1968); Barber v. Marina Sailing, Inc., 42 Cal. Rptr. 697, 704-06
 4 (1995). Because the allegation that Senator Wash Reservoir is a navigable waterway is not
 5 material to Plaintiff's claims against Defendant and because Plaintiff has only made that
 6 allegation to obtain federal jurisdiction, the Court may hear a factual challenge to this
 7 jurisdictional allegation in determining whether the Court has subject matter jurisdiction.¹

8 Alternately, the Court can hear this factual challenge because the allegation that
 9 Senator Wash Reservoir is a navigable waterway is insubstantial and/or frivolous. As
 10 conclusively demonstrated below, there is no factual basis whatsoever for the allegation that
 11 Senator Wash Reservoir is a navigable waterway for the purpose of establishing admiralty tort
 12 jurisdiction. Because the allegation is wholly unsupported by fact, it is insubstantial and/or
 13 frivolous, and the Court may hear this factual challenge to subject matter jurisdiction.

14 In weighing the factual support for the allegation that Senator Wash Reservoir is a
 15 navigable waterway for the purpose of determining admiralty tort jurisdiction, the Court may
 16 consider extrinsic evidence, including affidavits and declarations, take judicial notice, and
 17 hold evidentiary hearings. In re Everglades Island Boat Tours, LLC, 484 F.Supp. 2d 1259,
 18 1261 (M.D. Fla. 2007); Historic Aircraft Recovery Corp. v. Wrecked & Abandoned Voight
 19 F4U-1 Corsair Aircraft, 294 F.Supp. 2d 132, 133 (D.Me. 2003).

20 "In resolving a factual attack on jurisdiction, the district court may review
 21 evidence beyond the complaint without converting the motion to dismiss into
 22 a motion for summary judgment. Once the moving party has converted the
 23 motion to dismiss into a factual motion by presenting affidavits or other
 evidence properly brought before the court, the party opposing the motion

24 ¹ Almost since the date of this accident, Defendant has attempted to convince Plaintiff that
 25 California law, rather than federal maritime law, governs this action for the reasons stated in
 26 this Memorandum. See Severance Decl. Ex. G. In addition, Defendant has repeatedly
 27 explained to Plaintiff that his claims are barred by the doctrine of primary assumption of risk,
 28 since several California cases are factually indistinguishable from this one. Therefore,
 Plaintiff effectively was left only with the options of settling the case for nuisance value or
 rolling the dice by filing this action in federal court.

1 must furnish affidavits or other evidence necessary to satisfy its burden of
2 establishing subject matter jurisdiction.

3 Safe Air for Everyone v. Miller, 373 F.3d 1035, 1039 (9th Cir. 2003) (internal quotation and
4 citations omitted).

5 **C. The Court Does Not Have Admiralty Tort Jurisdiction Over Plaintiff's Complaint**
6 **Because Senators Wash Reservoir Is Not a Navigable Waterway.**

7 Because Defendant challenges subject matter jurisdiction, Plaintiff has "the burden of
8 proving by a preponderance of the evidence the facts supporting jurisdiction." In re
9 Bernstein, 81 F.Supp. 2d 176, 177 (D. Mass. 1999), quoting Bank One, Texas N.A. v. Montle,
10 964 F.2d 48, 50 (1st Cir. 1992). Therefore, Plaintiff has the burden of proving the facts
11 supporting both the location and connection parts of the test for admiralty tort jurisdiction by a
12 preponderance of the evidence.

13 The first part of the test "whether the tort occurred on navigable water," Gruver, 489
14 F.3d at 982, is a threshold issue. "It is the character of the waterway that first must be
15 decided. If the waterway in question is not navigable for admiralty purposes, it makes little
16 difference what craft sets sail." In re Three Buoys Houseboat Vacations U.S.A., Ltd., 921
17 F.2d 775, 780 (8th Cir. 1990). "[I]t is the very fact that the vessel is on a navigable waterway
18 at all that creates maritime jurisdiction." Id.; Hardwick v. Pro-Line Boats, Inc., 895 F.Supp.
19 145, 149 (S.D. Tex. 1995). Therefore, if the Court finds Senator Wash Reservoir fails the
20 location test because it is not a navigable waterway, the Court cannot reach the connection test
21 regarding a substantial relationship to traditional maritime activity.

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1 **1. Senator Wash Reservoir Is a Navigable Waterway Only If It Formed, or**
 2 **Was Part of, a Continuous Highway Upon Which Interstate Commerce By**
 3 **Water Could Have Been Conducted On June 10, 2006.**

4 Although there are four concepts of navigable waters in federal law, the only one that
 5 relevant to this case is navigability for the purposes of determining admiralty jurisdiction.¹
 6 See id. at 147; Oseredzuk v. Warner Co., 354 F.Supp. 453, 455-56 (D.Penn. 1972). The test
 7 to determine whether a body of water is navigable and thus subject to admiralty jurisdiction
 8 was announced by the United States Supreme Court in The Daniel Ball, 77 U.S. 557, 563
 9 (1870):

10 Those rivers must be regarded as public navigable rivers in law which are
 11 navigable in fact. And they are navigable in fact when they are used, or are
 12 susceptible of being used, in their ordinary condition, as highways of
 13 commerce, over which trade and travel may be conducted in the customary
 14 modes of trade and travel on water. And they constitute navigable waters of
 15 the United States within the meaning of the acts of Congress, in
 16 contradistinction from the navigable waters of the States, when they form in
 17 their ordinary condition by themselves, or by uniting with other waters, a
 18 continued highway over which commerce is or may be carried on with other
 19 States or foreign countries in which such commerce is conducted by water.

17 Davis v. United States, 185 F.2d 938, 942-43 (9th Cir. 1950) (restating the test in analyzing
 18 whether Lake Tahoe was a navigable waterway for admiralty tort jurisdiction); Three Buoys,
 19 921 F.2d at 778; Crawford v. Electric Boat Corp., 515 F.Supp. 2d 282, 287-88 (D.Conn.
 20 2007); Bernstein, 81 F.Supp. at 178; Hardwick, 895 F.Supp. at 147; Oseredzuk, 354 F.Supp.
 21 at 455.

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23
 24 ¹ “[T]he Supreme Court indicated that “navigability” has been used to define four separate
 25 and distinct concepts: (1) to delineate boundaries of navigational servitudes; (2) to define the
 26 scope of Congress’ regulatory authority under the Commerce Clause; (3) to determine the
 27 extent of authority of the Army Corps of Engineers under the Rivers and Harbors
 28 Appropriation Act of 1899; and (4) to establish the limits of the jurisdiction of federal courts
 conferred by Article III, § 2 of the United States Constitution over admiralty and maritime
 cases.” Hardwick, 895 F.Supp. at 147, citing Kaiser Aetna v. United States, 444 U.S. 164
 (1979).

1 The Daniel Ball test of navigability in fact “applies to all bodies of water, natural as
 2 well as artificial” Hardwick, 895 F.Supp. at 147 (applying the test to Lake Houston,
 3 which was created by damming the San Jacinto River), citing Ex Parte Boyer, 109 U.S. 629,
 4 632 (1884). Therefore, for the Court to find that Senator Wash Reservoir is navigable in fact,
 5 and thus a navigable waterway for the purposes of determining admiralty jurisdiction, Senator
 6 Wash Reservoir must form, or be part of, a continuous highway upon which interstate or
 7 foreign trade and travel (“interstate commerce”) by water can be conducted.

8 Furthermore, the Court must restrict its inquiry to the navigability of Senator Wash
 9 Reservoir as it existed on June 10, 2006, because navigability in fact is determined at the time
 10 the loss occurred. Oseredzuk, 354 F.Supp. at 456. The possibility of future navigability is
 11 irrelevant to the determination of admiralty jurisdiction; instead it goes to the Commerce
 12 Clause power of Congress to regulate, one of the other three concepts of navigability in
 13 federal law. Id. “Present navigability is the standard, and present navigability, as we construe
 14 it for admiralty . . . purposes, is not possible on the Lake of the Ozarks.” Three Buoys, 921
 15 F.2d at 779.

16 Therefore, for this Court to exercise admiralty tort jurisdiction over Plaintiff’s
 17 Complaint, it must find that Senator Wash Reservoir formed, or was part of, a continuous
 18 highway upon which interstate commerce was able to be conducted on June 10, 2006. As
 19 demonstrated below, such a finding is not possible.

20 **2. There Is No Evidence of Actual Interstate Commerce Taking Place on** 21 **Senator Wash Reservoir.**

22 Federal courts have found waters on which actual interstate commerce takes place to be
 23 navigable waterways for the purposes of supporting admiralty jurisdiction. “A body of water
 24 is part of the navigable water of the United States if it supports interstate commerce.” Minix v.
 25 Fellers, 654 F.Supp. 1127, 1128 (N.D. Cal. 1987), citing Davis, 185 F.2d at 943. Here,
 26 interstate commerce means interstate shipping. “Commerce for the purpose of admiralty
 27 jurisdiction means activity related to the business of shipping, and not non-commercial fishing

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1 and pleasure boating.” Id., citing Adams v. Montana Power Co., 528 F.2d 437, 439 (9th Cir.
2 1975).

3 In Minix v. Fellers, 654 F.Supp. 1127, 1129 (N.D. Cal. 1987), the court found that the
4 present use of Clear Lake for recreational water sports and non-commercial fishing was purely
5 intrastate and non-commercial, despite past evidence of the transportation of U.S. mail and
6 commercial fishing on the lake, and that such usage did not support a finding that Clear Lake
7 was part of the navigable waters of the United States. Here, there is no evidence whatsoever,
8 past or present, of interstate commerce taking place on Senator Wash Reservoir.
9 Consequently, there is no actual use in interstate commerce to support a finding that Senator
10 Wash Reservoir is navigable in fact on June 10, 2006.

11 **3. Senator Wash Reservoir Is Not Per Se Capable of Carrying Interstate**
12 **Commerce Because It Is Wholly Contained in the State of California.**

13 Federal courts have also found that waters that cross state lines are susceptible to being
14 used in interstate commerce and are therefore navigable in fact per se. Davis, 185 F.2d at 941
15 (finding Lake Tahoe to be navigable because it is partly in the State of Nevada and partly in
16 the State of California); see Three Buoys, 921 F.2d at 777 (referring to the Supreme Court’s
17 implicit finding regarding Lake Michigan in Sisson v. Ruby, 497 U.S. 358 (1990)). Here,
18 however, Senator Wash Reservoir is wholly contained within the state of California. (Def.’s
19 Req. J. Notice; Soto Decl. ¶ 9, Ex. A, Ex. B at 3; Severance Decl. Ex. A at coordinates E2 to
20 F2, Ex. B at 3, Ex. D at 6, Ex. E.) Therefore, the waters of Senator Wash Reservoir were not
21 navigable in fact per se on June 10, 2006.

22 **4. Senator Wash Reservoir Is Not Capable of Carrying Interstate Commerce**
23 **Because It Is Landlocked and Dammed.**

24 Time after time, federal courts have found that landlocked and/or dammed waters
25 wholly contained in one state are not navigable in fact because interstate commerce cannot
26 take place upon them. Therefore, landlocked and/or dammed waters do not support admiralty
27 tort jurisdiction.

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1 In Three Buoys, 921 F.2d at 779, a court found that “the Lake of the Ozarks is not
2 navigable in fact because of the existence of the Bagnell Dam” despite the alleged
3 navigability of the Osage River before construction of the dam. The court also found the
4 lake was not navigable because it is wholly contained in the State of Missouri and any
5 commercial use of it was therefore purely intrastate. Consequently, the court dismissed the
6 complaint for a lack of admiralty tort jurisdiction.

7 In In re Bernstein, 81 F.Supp.2d 176 (D.Mass. 1999), a collision case involving a
8 towed inner tube, a court found that Lake Winniquisquam was wholly contained in the State
9 of New Hampshire and landlocked by lockless dams and hydroelectric stations. See 81
10 F.Supp. at 178-79. The court therefore found that it was not possible to use the lake to
11 conduct interstate commerce and the lake was not navigable for the purposes of determining
12 admiralty tort jurisdiction. Id. at 179.

13 In Guillory v. Outboard Motor Corp., 956 F.2d 114 (5th Cir. 1992), a court found that a
14 reservoir “created for recreation and flood control by a dam” was wholly contained in the
15 State of Louisiana, that vessels on the reservoir could not access the adjacent navigable bayou,
16 and that interstate travel was not possible on the waters that fed the dam. See id. at 115.
17 Therefore, the court found that the waters of the reservoir were not navigable and affirmed the
18 district court’s dismissal of the case for lack of subject matter jurisdiction.

19 In Hardwick v. Pro-line Boats, Inc., 895 F.Supp. 145, 148-49 (S.D. Tex. 1995), a
20 district court found that a dam on the San Jacinto River rendered Lake Houston “landlocked
21 to navigation in interstate commerce and travel throughout the year.” The existence of the
22 dam, combined with the fact that “Lake Houston is located entirely within the State of Texas”
23 led the court to find that “it is currently impossible for any boat to travel from the lake to any
24 ‘navigable’ body of water” and the lake was “not capable of being used in interstate
25 commerce.” Id. The court therefore found Lake Houston was not navigable and granted a
26 motion to dismiss for lack of admiralty jurisdiction.

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1 In Minix v. Fellers, 654 F.Supp. 1127, 1128 (N.D. Cal. 1987), a court found that
 2 although “[s]everal small streams and springs feed Clear Lake at one end,” the streams were
 3 too small to support commercial boating. The court also found that the other end was
 4 “completely and permanently dammed” and the dams “prevent[ed] the lake from serving as a
 5 passageway for commercial boats to and from other waterways.” Id. The court therefore
 6 found the California lake was not navigable for the purpose of determining admiralty tort
 7 jurisdiction.

8 In Oseredzuk v. Warner Co., 354 F.Supp. 453, 455-455 (E.D. Pa. 1972), a court found
 9 that an artificial, landlocked lake adjacent to another landlocked lake was not navigable even
 10 though the second lake was adjacent to a navigable river because “no boats, ships or vessels
 11 may enter or leave these two lakes by way of water.” The court stated “land-locked lakes
 12 located wholly within one state have consistently been found to be nonnavigable within the
 13 meaning of admiralty law.” Id. (citing to five cases from the 1950s and 1960s in which other
 14 district courts “found a lack of admiralty jurisdiction because the land-locked lake was not
 15 connected with any other navigable water”).

16 The court found no merit in the argument that the lake could become navigable by
 17 removing the land separating it from the other lake and the Delaware River. Id. at 456.
 18 Because the court found the lake non-navigable, it granted a motion to dismiss for lack of
 19 subject matter jurisdiction. Id. at 454.

20 Here, as in Three Buoys, Bernstein, Hardwick, Minix, and Oseredzuk, Senator Wash
 21 Reservoir is landlocked, dammed, and wholly contained in the State of California. (Def.’s
 22 Req. J. Notice; Soto Decl. ¶¶ 8-10, Ex. A at 3, Ex. B, Ex. C at 15; Severance Decl. Ex. A at 3,
 23 Ex. B at coordinates E2 to F2, Ex. C at 15, Ex. D at 5-6, Ex. E, Ex. F at 24; Cano v. Neill, 473
 24 P.2d 487, 489 (Ariz. Ct. App. 1970).) Therefore, it is not physically possible to operate a
 25 vessel to travel from Senator Wash Reservoir onto any other body of water. (Soto Decl. ¶ 12;
 26 see Soto Decl. Ex. A at 3, Ex. B, Ex. C at 15; Severance Decl. Ex. A at 3, Ex. B at coordinates
 27 E2 to F2, Ex. C at 15.)

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As in Oseredzuk, the mere proximity of the Colorado River to Senator Wash Reservoir is not sufficient by itself to render the waters of Senator Wash Reservoir navigable. Lockless earthen dams and dikes prevent vessels on the waters of Senator Wash Reservoir from traveling onto the Colorado River system. (Soto Decl. ¶¶ 8, 11; see Soto Decl. Ex. A at 3, Ex. B, Ex. C at 15; Severance Decl. Ex. A at 3; Ex. B at coordinates E2 to F2, Ex. C at 15, Ex. D at 5-6 (no description of navigable locks), Ex. F at 24 (no description of navigable locks).)

Because it is not physically possible to travel by vessel from the waters of Senator Wash Reservoir onto any other waters, any use of it made by vessels is purely intrastate. Therefore, no interstate commerce can take place upon Senator Wash Reservoir and it was not navigable in fact on June 10, 2006.

5. Senator Wash Reservoir Is Not A Navigable Waterway. Therefore, the Court Does Not Have Admiralty Tort Jurisdiction over Plaintiff's Complaint.

Because there is no evidence of interstate commerce taking place on Senator Wash Reservoir, because the Reservoir is wholly contained in California, and because the Reservoir is both landlocked and dammed, it was not navigable in fact on June 10, 2006. Under these circumstances, Senator Wash Reservoir clearly did not form, and was not part of, a continuous highway upon which interstate and foreign trade and travel could be conducted on June 10, 2006. Therefore, Senator Wash Reservoir was not navigable on June 10, 2006.

Because Senator Wash Reservoir was not navigable, Plaintiff's Complaint fails the location test for admiralty tort jurisdiction. As the location test is a threshold issue, the Court cannot reach the connection test. Accordingly, the Court does not have admiralty tort jurisdiction over Plaintiff's Complaint. In the absence of another valid basis for the exercise of subject matter jurisdiction, the Court must dismiss Plaintiff's Complaint.

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D. Because There Is No Basis For Admiralty or Any Other Subject Matter Jurisdiction Here, the Court Should Dismiss Plaintiff's Complaint.

There is no other basis valid basis to support the exercise subject matter jurisdiction over Plaintiff's Complaint.

Although Plaintiff alleges that the Court has jurisdiction under the Admiralty Jurisdiction Extension Act, 46 U.S.C. § 740 et seq. (Compl. ¶ 1.), the Act does not apply. The Act was recodified at 46 U.S.C. App. § 740 et seq. in 1983 and again at 46 U.S.C. § 30101 et seq. in 2006. These statutes extend admiralty tort jurisdiction to damage or injuries caused by vessels on navigable waters but "consummated on land." 46 U.S.C. App. § 740 (2000); 46 U.S.C. § 30101 (2007).

As demonstrated conclusively in Section III.C. above, Senator Wash Reservoir is not navigable. Furthermore, Plaintiff's Complaint alleges injuries sustained in a collision "on the navigable waters of Senator's [sic] Wash" (Compl. ¶¶ 9, 22), not on land. Because Senator Wash Reservoir is not navigable and because Plaintiff does not allege an injury or damage that occurred on land, the Act does not apply and cannot support the Court's exercise of jurisdiction over the Plaintiff's Complaint.

Furthermore, Plaintiff's Complaint does not allege any other basis for jurisdiction. (See Compl. ¶¶ 1-4.) Even if Plaintiff had alleged diversity jurisdiction under 28 U.S.C. § 1332, there is no diversity of citizenship here that would support it, because the Complaint alleges that Plaintiff and all named defendants are residents of California. (Compl. ¶¶ 2-3.) Consequently, the Court does not have statutory, federal question, or diversity jurisdiction over Plaintiff's Complaint.

Because the Court does not have admiralty tort jurisdiction over Plaintiff's Complaint, and because there other basis upon which the Court can exercise subject matter jurisdiction here, the Court must dismiss Plaintiff's Complaint for a lack of subject matter jurisdiction.

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1 **IV. CONCLUSION**

2 Because Senator Wash Reservoir is landlocked and wholly contained in the State of
3 California, it is not a navigable waterway and consequently cannot satisfy the location test for
4 admiralty tort jurisdiction. As Plaintiff has alleged no other valid basis for jurisdiction, the
5 Court lacks subject matter jurisdiction to hear Plaintiff's Complaint. Therefore, Defendant
6 requests that the Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.
7

8 DATED: July 14, 2008

SANDS LERNER

9
10 By: 

NEIL S. LERNER

11 ARTHUR A. SEVERANCE

12 Attorneys for Defendant,

13 MANEUL SOTO, JR.
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is 12400 Wilshire Boulevard, Suite 1300, Los Angeles, California, 90025.

On **July 14, 2008** I served the foregoing documents described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT
MANUEL SOTO, JR.'S MOTION TO DISMISS**

on the interested parties in this action:

See attached Service List

- ☒ (BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ (BY FACSIMILE) I am responsible for service by facsimile to the above addresses.
- ☐ (PERSONAL) I delivered such envelope by hand to the offices of the addressee.
- ☐ (BY FEDERAL EXPRESS) I am responsible for service by Federal Express to the above address with guaranteed delivery by 10:00 a.m. on _____.
- ☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **July 14, 2008** at Los Angeles, California.


Ruthelene Luckey

SERVICE LIST

David Santoyo, Jr. v. Manuel Soto, Jr.

USDC-Southern (San Diego) Case No. 08-CV-1000 W BLM

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Mailing Information for a Case 3:08-cv-01000-W-BLM

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